Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C 4797 OF 1985
VC GEORGE J
18 FEBRUARY 1993

Civil Procedure *— Costs — Lack of authority of solicitor to act — Solicitor ordered to pay costs to defendants for unauthorized issue of writ*

On 11 May 1990, judgment was delivered in respect of prayers 1–4 of the defendants' application. [See [1990] 3 MLJ 239.] Prayer 5, which was for the costs of and incidental to the application to be paid by the plaintiff and/or the plaintiff's solicitor, was adjourned for further argument and has now been heard by the court.

Held, making an order for costs to be paid for by the solicitors:
The writ having been caused to be issued by M/s Chooi & Co purporting to act as agents of the plaintiffs and it having been found that the plaintiffs had not in fact appointed M/s Chooi & Co to cause the writ to issue or at all, M/s Chooi & Co will have to bear the consequences of their unauthorized dragging of the defendants to court.

Per curiam:
Chooi & Co may have recourse against whoever it was who had purported to instruct them in order to recover the amounts that they had to pay as costs. In any event that they have such recourse per se does not provide a bar to the defendants seeking the costs from the solicitors who has caused the writ to issue.

[Bahasa Malaysia summary

Pada 11 Mei 1990, penghakiman telah dibuat terhadap pohonan 1–4 di dalam permohonan defendan. [Lihat [1990] 3 MLJ 239.] Pohonan 5 supaya kos bagi dan yang berkaitan dengan permohonan itu dibayar oleh plaintiff dan/atau peguambela plaintif telah ditangguh untuk penghujahan lanjut dan sekarang telah didengar oleh mahkamah.

Diputuskan, membuat suatu perintah supaya kos dibayar oleh peguambela itu:
Writ itu telah dikeluarkan oleh M/s Chooi & Co yang dikatakan bertindak sebagai agen plaintif dan oleh kerana plaintif didapati pada hakikatnya tidak melantik M/s Chooi & Co untuk mengeluarkan writ itu sama sekali, M/s Chooi & Co terpaksa menerima akibat membawa defendan ke mahkamah tanpa kebenaran.

Per curiam:
Chooi & Co boleh bertindak terhadap sesiapa yang telah mengarahkan mereka untuk mendapat balik jumlah kos yang terpaksa dibayar.

A Walau bagaimanapun ini tidak akan menghalang defendan untuk mendapatkan kos dari peguambela yang telah mengeluarkan writ itu.]

Cases referred to

1 *Daimler v Continental Tyre & Rubber Co* [1916] 2 AC 307 (refd)
2 *United Investment and Finance Ltd v Tee Chin Yong & Ors* [1967] 1 MLJ 31 (distd)
3 *Yonge v Toynbee* [1909] 1 KB 215 (folld)
4 *Collen v Wright* 8 E&B 637 (folld)

Tan Lai Ling (*Chooi & Co*) for the plaintiffs.
S Kanawagi (*Khana & Co*) for the defendants.

Cur Adv Vult

VC George J: On 11 May 1990, judgment was delivered in respect of prayers 1–4 of the application. Inter alia, as prayed for by the defendants, the writ was struck out on the ground that it was caused to be issued by the solicitors Messrs Chooi & Co of Kuala Lumpur, without the due authority of the plaintiff company. [See [1990] 3 MLJ 239.] Prayer 5 which was for 'the costs of and incidental to the application be paid by the plaintiff and/or the plaintiff's solicitors' was adjourned for further argument which I have now heard.

In respect of the issue of the costs, Ms L Tan appeared on the instructions of M/s Chooi & Co and held herself out as being counsel for the plaintiffs. Having found as I did that the plaintiffs in fact had not appointed M/s Chooi & Co to act for them, I have assumed that in fact she appeared for M/s Chooi & Co. Such an assumption can be said to be supported by Ms Tan seeking an adjournment of the hearing pending the disposal of an originating summons that M/s Chooi & Co have taken out in their firm's name in court No 6 for an order that the costs of and incidental to encl (33) herein be paid by one Soo Seng Chuan to the defendants. Ms Tan explained that it was not possible to bring in Soo Seng Chuan into this instant action because the writ had been struck off. The adjournment sought however was refused. That there is that application where the issues are more or less the same as the issues to be adjudicated on here does not per se provide a good reason to adjourn the hearing of this matter.

In respect of the costs, the order that eventually would be given could be that the plaintiffs or M/s Chooi & Co or Soo Seng Chuan bear the costs of encl (33). It could also be that there be no order as to costs as was the case in *Daimler v Continental Tyre & Rubber Co*[1] at p 348 and in *United Investment and Finance Ltd v Tee Chin Yong & Ors*.[2] However it is to be noted that at p 36 of *United Investment Finance Ltd*,[2] Chua J said:

> It would appear from the authorities that if the defendants had questioned the authority to sue by way of motion to strike out the name of the company as plaintiffs or to stay or dismiss these actions the defendants could have in the same motion asked for costs against Wong Heing Tock, who was the person who commenced these unauthorized actions, and against the solicitors who act for the company without authority of the company and the court could have ordered them to pay the costs. But the defendants did not proceed in that manner and the

position now is that Wong Hieng Tock and the solicitors acting for the company are not parties to these proceedings and they cannot be ordered to pay the costs. The defendants if they desire costs must, I am afraid, decide what further action to take in the matter.

In the instant case, unlike what had happened in *United Investment Finance Ltd*,[2] the defendants had successfully questioned the authority to sue and have asked for the costs to be paid by the plaintiffs and/or the plaintiffs' solicitors.

In my judgment, the writ having been caused to be issued by M/s Chooi & Co purporting to act as agents of the plaintiffs and it having been found that the plaintiffs had not in fact appointed M/s Chooi & Co to cause the writ to issue or at all, M/s Chooi & Co have to bear the consequences of their unauthorized dragging of the defendants to court. I have found support in this view of the matter in the English case of *Yonge v Toynbee*[3] where the English Court of Appeal held that the solicitors who had taken on themselves to act for the defendants in the action had thereby impliedly warranted that they had authority to do so and therefore were liable personally to pay the plaintiffs' cost of the action. The ratio in *Collen v Wright*[4] was applied as can be seen at pp 225 and 226 of *Yonge v Toynbee*[3] where a passage from *Collen v Wright*[4] is quoted:

> I am of opinion that a person who induces another to contract with him, as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue ... The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist.

Chooi & Co, of course, may have recourse against whoever it was who had purported to instruct them in respect of the company in respect of the amounts that they have to pay as costs. They say it is Soo Seng Chuan. Nothing can be done about that here because he has not been heard. In any event that they have such recourse per se does not provide a bar to the defendants seeking the costs from the solicitors who had caused the writ to issue.

The defendants are entitled to have an order against M/s Chooi & Co in respect of the costs of and incidental to encl (33) (which includes the costs of the action) and it is so ordered.

Ms Tan had applied for a stay of execution of their order in respect of the costs pending disposal of the originating summons in court No 6. I could find no good reason to order such a stay. The application was refused.

Order accordingly.

Reported by Jeanne Tan